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*Handwritten signatures: CTW, Nancy Abraham*



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**By Federal Express**

Hon. Christie Whitman  
Administrator

U.S. Environmental Protection Agency  
Ariel Rios Bldg. 1101A  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

July 19, 2002

RECEIVED

EXEC. SECRETARIAT

**Re: Maine's Application for NPDES Permitting Authority Within Tribal Waters**

Dear Governor Whitman:

I am in receipt of a copy of a letter dated June 24, 2002 from Maine Governor Angus King to you concerning the State of Maine's application to administer the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) within tribal waters.

On behalf of the Penobscot Nation, I want to express strong disagreement with Governor King's alarmist approach. The EPA should not act precipitously on this very sensitive matter. Maine has not provided "conclusive evidence" of its legal authority to administer the program within tribal waters.

Maine's NPDES application has generated tremendous controversy because of the implications it has for state jurisdiction over environmental matters directly affecting the health, safety and cultural integrity of Indian tribal communities. This is not something to be considered lightly. Indeed, the federal government has a historic trust responsibility, grounded in the Constitution, to protect the welfare of Indian tribes in the face of state and local pressure.

The problem cannot be overstated for the Penobscot Nation. The Penobscot Indian Reservation encompasses the islands and waters of the Penobscot River from Indian Island, northward. Our waters have been polluted with dioxin and other toxic substances from the discharges of paper mills along the river, and it is no secret that Maine's paper industry wields tremendous political influence in this state. We have lived with polluted waters from that industry for many years. Notwithstanding our Tribe's protected right, under the Maine Indian Claims Settlement Act, to engage in sustenance fishing on the Penobscot River, our tribal members cannot eat the fish. In fact, fish consumption advisories extend from the principal residence of our tribal members, at Indian Island, forty miles upriver to Lincoln Pulp and Paper, one of the pollutant dischargers. The advisories warn that the fish are contaminated with dioxin and that consumption of the fish presents cancer risks.

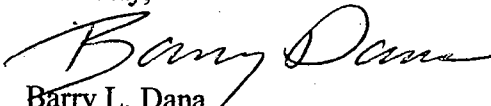
Never has the EPA delegated NPDES authority to a state within Indian country. This is because, as you noted in your recent remarks at the National Tribal Conference on Environmental Management, "tribal governments are the most appropriate parties for managing the environment on Indian lands." The Department of the Interior (at EPA's request) provided an opinion on Maine's application. It concluded that Maine lacks adequate authority to administer the NPDES program within the waters of the Penobscot Nation and the Passamaquoddy Tribe because water quality management within the tribes' reservations and trust lands is an "internal tribal matter" under the Maine Indian Claims Settlement Act. It is a matter reserved for federal or tribal control and excluded from state control.

As numerous federal cases confirm, where states apply for authority to run federal environmental programs, the EPA, in the exercise of its "core federal trust responsibilities," appropriately retains federal authority over environmental pollution affecting the reservations. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245-46 (10<sup>th</sup> Cir. 2000); *Phillips Petroleum Co. v. United States EPA*, 803 F.2d 545 (10<sup>th</sup> Cir. 1986); *State of Washington v. USEPA*, 752 F.2d 1465 (9<sup>th</sup> Cir. 1985). As the United States Court of Appeal for the Seventh Circuit recently pointed out, where (as is the case in Maine) a tribe is not seeking Clean Water Act regulatory authority, "the EPA and not the state . . . might well be the proper authority to administer Clean Water Act programs for the reservation." *Wisconsin v. EPA*, 266 F.3d 741, 747 (7<sup>th</sup> Cir. 2001) (emphasis added). The Department of the Interior has reached that conclusion with respect to Maine's application.

The EPA is acting in a prudent and responsible manner by treading carefully in this area of jurisdictional controversy. This is not bad government, as Governor King suggests. Nor does it threaten to freeze economic activity as he suggests. The State can consent to EPA permitting at any time during the pendency of its NPDES application. There is no crisis in the making.

We urge the EPA to stay its course and not be swayed by state pressure in this delicate undertaking. Thank you for your understanding.

Sincerely,

  
Barry L. Dana  
Chief, Penobscot Nation

cc: Robert W. Varney, Regional Administrator  
Carol Jorgensen, Director EPA Indian Office  
William G. Meyers III, Solicitor, U.S. Department of the Interior  
Phil Hogan, Associate Solicitor, U.S. Department of the Interior  
Governor Rick Doyle, Passamaquoddy Tribe  
Governor Richard Stevens, Passamaquoddy Tribe  
Chief Brenda Commander, Houlton Band of Maliseet Indians  
Chief Billy Phillips, Aroostook Band of Micmac Indians